In the
Supreme Court of the United States.

No. 77-932.

BOARD OF APPEALS OF SCITUATE,
PETITIONER,
v.
HOUSING APPEALS COMMITTEE AND
PLANNING OFFICE FOR URBAN AFFAIRS, INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

Respondents' Joint Brief in Opposition to Certiorari.

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Question Presented.

Does the decision of the Massachusetts Housing Appeals Committee, directing the Board of Appeals of Scituate to issue a comprehensive permit to the Planning Office For Urban Affairs, Inc., authorizing the construction of subsidized low and moderate income housing, violate the Establishment Clause of the First Amendment to the United States Constitution?

Statement of the Case.

Petitioner, Board of Appeals of Scituate (Scituate), seeks review by writ of certiorari of two Massachusetts state court decisions[1] affirming an earlier administrative decision of the respondent Housing Appeals Committee in the Department of Community Affairs of the Commonwealth of Massachusetts (the Committee) directing Scituate to issue to the respondent Planning Office for Urban Affairs, Inc. (the Planning Office) a comprehensive permit for the construction of low and moderate income housing on land located in the town of Scituate. The facts underlying this sequence of consistent administrative and judicial decisions are briefly summarized below.

On May 1, 1973, the Planning Office sought authorization from Scituate to develop forty townhouse-type dwellings to be made available to low and moderate income families. The property on which the project is to be constructed was then owned by the Roman Catholic Archbishop of Boston. The Planning Office is a charitable corporation organized under the provisions of Mass. Gen. Laws Ann. c. 180 (West 1958). Although a separate legal entity, the Planning Office is an agency of the Archdiocese of Boston.

The Planning Office submitted an application to Scituate for a comprehensive permit in accordance with Mass. Gen.

[1] The two Massachusetts courts are the Superior Court and the Massachusetts Appeals Court. The order of the Massachusetts Supreme Judicial Court denying Scituate's Application for Further Appellate Review is not a judgment affirming the decision of the Appeals Court, but rather is simply a denial of further review as provided by Mass. Gen. Laws Ann. c. 211A, § 11 (West Supp. 1977). *Ford* v. *Flaherty*, 364 Mass. 382, 387-88, 305 N.E.2d 112, 116 (1973). Accordingly, the order of the Supreme Judicial Court is not the final judgment of the highest court subject to review by writ of certiorari pursuant to 28 U.S.C. § 1257(3) (1970).

Laws Ann. c. 40B, §§ 20-23 (West Supp. 1977). (A copy of this statute is reproduced as an appendix to this brief.) This statute enables a qualified applicant[2] to file with a local board of appeals a single application for a comprehensive permit to build subsidized low or moderate income housing, thereby avoiding the usual procedure of submitting separate applications to each local agency having authority over the various aspects of the project. The Planning Office had previously obtained a firm commitment from the Massachusetts Housing Finance Agency (MHFA) to provide financing for the project pursuant to Mass. St. 1966, c. 708 (unofficially codified at Mass. Gen. Laws Ann. c. 23A App., §§ 1-1 et seq. [West 1973]), which authorizes the agency to make first mortgage loans to sponsors of multi-family dwellings. The Archdiocese had also previously expressed its intention to donate the property to the Planning Office.[3] According to its development proposal, the Planning Office will, in turn, convey the property to another charitable corporation which will receive the mortgage funds, as well as the comprehensive permit, and will assume responsibility for the project's development.[4] Upon completion and occupancy of the project, title to the property and responsibility for the mortgage will be assigned to a cooperative corporation composed of the occupants of the dwellings.

[2] The class of proper applicants is limited to public agencies, non-profit organizations and limited dividend corporations. Mass. Gen. Laws Ann. c. 40B, § 20.

[3] The conveyance of the property from the Archdiocese to the Planning Office occurred on August 4, 1977.

[4] The mortgagor corporation was organized on October 6, 1977, as Scituate Homes, Inc., pursuant to Mass. Gen. Laws Ann. c. 180, for the purpose of constructing the dwellings and selecting the occupants. The MHFA financing commitment has already been assigned to Scituate Homes, Inc.

After conducting an administrative hearing, Scituate denied the Planning Office's application for a comprehensive permit. In accordance with Mass. Gen. Laws Ann. c. 40B, § 23, the Planning Office appealed that decision to the Committee which is authorized to hear appeals by developers when an application for a comprehensive permit is denied by a local board. The Committee concluded, after an extensive adjudicatory hearing, that Scituate's denial of the application was unreasonable and not consistent with local needs, in contravention of the standards set forth in Mass. Gen. Laws Ann. c. 40B, § 20. Accordingly, the Committee directed Scituate to issue the comprehensive permit, as provided by Mass. Gen. Laws Ann. c. 40B, § 23.

Scituate petitioned the Massachusetts Superior Court for review of the Committee's decision. The Superior Court entered judgment denying the petition and affirming the Committee's decision (Appendix to Petition [Pet. App.] 28). The Massachusetts Appeals Court affirmed the judgment of the Superior Court (Pet. App. 13), and the Massachusetts Supreme Judicial Court denied Scituate's Application for Further Appellate Review (Pet. App. 11). Both the Superior Court and the Appeals Court rejected Scituate's contention that the Committee's decision violated the First Amendment by excessively entangling the Commonwealth in church affairs.

Reasons for Denying the Writ.

Scituate contends that the Committee's decision, as affirmed upon judicial review, violates the Establishment Clause of the First Amendment to the United States Constitution because it authorizes the rendering of state aid to a

religious organization. The challenged decision directed Scituate to issue to the Planning Office a comprehensive permit for the construction of a state subsidized housing project for low and moderate income families (Pet. App. 53). This decision and the judgments of the Massachusetts courts are in full accord with the principles this Court has used to guide its construction of the proscriptions of the Establishment Clause. As the Superior Court stated, Scituate's argument is "a mere figment" (Pet. App. 18).

One should note at the outset that the Committee's decision does not itself constitute financial assistance to the Planning Office. The state aid which Scituate objects to is mortgage financing from an independent state agency, the Massachusetts Housing Finance Agency (Pet. App. 15).[5] Although the Committee's authority is limited to cases in which the housing project is to be subsidized by a federal or state program by virtue of the statutory definition of "low and moderate income housing," Mass. Gen. Laws Ann. c. 40B, § 20, that factor is clearly tangential to the central purpose of the Committee's statutory mandate. The Legislature's purpose in enacting Mass. Gen. Laws Ann. c. 40B, §§ 20-23, was "to provide relief from exclusionary zoning practices [of the cities and towns of Massachusetts] which [have] prevented the construction of badly needed low and moderate income housing." *Board of Appeals of Hanover* v. *Housing Appeals Committee*, 363 Mass. 339, 353-54, 294 N.E. 2d 393, 406 (1973). The statute facilitates the construction of subsidized housing by authorizing the Committee, as well as the local boards of appeal, to override

[5] State funds have not actually been extended to the Planning Office or the mortgagor corporation at this time. MHFA, which has not been a party to the proceedings, has simply made a formal commitment to provide the mortgage financing.

restrictive zoning ordinances and other local regulations which are not "consistent with local needs" as defined by Mass. Gen. Laws Ann. c. 40B, § 20. *Hanover*, *supra* at 354. Accordingly, the Committee's authority to require the issuance of a comprehensive permit is only a means by which the Commonwealth removes obstacles to the construction of subsidized housing, and its decision in this case does not constitute the granting of state financial aid to the Planning Office.

Alternatively, to the extent that the Committee's decision constitutes the rendition of state aid by facilitating the Planning Office's development of subsidized, cooperatively owned housing for low and moderate income families, it does not violate the Establishment Clause. Scituate contends that the decision fosters an excessive government entanglement with religion. However, as evidenced by Scituate's failure to delineate the manner in which this alleged entanglement will result, the considerations relevant to a finding of impermissible entanglement are simply not present in these circumstances.

In construing the range and effect of the Establishment Clause, this Court, while recognizing that a hermetic separation of church and state is an impossibility, has enforced a scrupulous neutrality by the state. *See Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 745-46 (1976) (state aid to religiously affiliated colleges held constitutional). The Establishment Clause confines state aid to secular objectives which neither advance nor impede religious activity. *Roemer*, *supra* at 747. The focus of the Court's concern has been to avoid not only direct support for religious activity, but also the creation of an intimate relationship with a religious authority which appears to involve either sponsorship of or excessive interference with that authority. *Roemer*, *supra*, at 747-48.

Such indications of excessive entanglement are not at issue under the facts of this case. The three factors which this Court considers determinative of this question are (1) the character and purpose of the benefited institution; (2) the nature of the aid provided; and (3) the resulting relationship between the state and the religious authority. *Roemer*, *supra* at 748; *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). Admittedly, the Planning Office is affiliated with the Roman Catholic Archdiocese of Boston. Nonetheless, it is a separate legal entity engaged in a secular activity. *See Bradfield* v. *Roberts*, 175 U.S. 291, 297 (1899) (corporation composed of members of Roman Catholic sisterhood is not a sectarian body and is entitled to public aid because limited to the secular purpose of operating a hospital). The assignee of the Planning Office's comprehensive permit and the signatory for the MHFA financing agreement will be yet another charitable corporation with no relationship to the Archdiocese. Moreover, ownership of the project, as well as the responsibility for the MHFA mortgage and taxes, will be transferred to a cooperative corporation composed of the occupants of the housing project upon its completion (Pet. App. 17). As the developers of the project, the Planning Office is simply the initiator and the mortgagor corporation is merely the financial conduit through which the required construction funds will flow and enable needed low and moderate income housing to be constructed in Scituate. The beneficiary of the state aid is not the Roman Catholic Church, as Scituate contends, but rather the occupants of the housing project, selected without regard to religion, race, color, or national origin. *Cf. Board of Education* v. *Allen*, 392 U.S. 236 (1968) (loan of secular textbooks benefits children, not religious institution); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (beneficiaries of reimbursement for transportation to sectarian schools are private citi-

zens, not religious institutions). Viewed under the analysis developed in this Court's prior decisions, the conclusion is inescapable that the entity ultimately benefited by the Committee's decision is not properly considered to be religiously affiliated.

The state aid which MHFA will provide is limited to the mortgage financing for the secular purpose of constructing low and moderate income housing. Recognizing the importance of this fact, Scituate contends that this Court's holding in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), is inapplicable to the facts of this case. In *Tilton* this Court determined that a governmental grant of construction financing to religiously-affiliated colleges was constitutional, partly because the grant was for one time only. Although the significance of the fact that the aid was a one-time, single-purpose grant has been largely minimized, *see Roemer* v. *Board of Public Works of Maryland*, *supra* at 764, it is nonetheless an attribute of the arrangement which Scituate challenges in this case. As with conventional mortgages, MHFA financing involves a single extension of funds which are repaid over a period of time. Mass. St. 1966, c. 708, § 5. Thus, the Planning Office's development scheme lacks the aspects of continuing payments and resultant need for surveillance to ensure continued non-sectarian purpose which proved fatal to the Pennsylvania teacher's aid program in *Lemon* v. *Kurtzman*, *supra* at 621. Even more significant, however, is that no monetary benefit accrues to either the Planning Office or the mortgagor corporation. The non-profit character of both corporations and the designated purpose of the MHFA financing permit them to serve merely as a conduit of mortgage funds which will be used solely for the benefit of the low and moderate income occupants of the housing project.

Scituate's failure to suggest the existence of any continuing relationship between the state and the church as a result of the Committee's decision is telling. Since the ultimate mortgagor and the owner of the project will be the cooperative corporation of occupants with no affiliation with the church, there is no relationship which might conceivably be construed to entangle the state in church affairs. In sum, the challenged decision has no effect on the Roman Catholic Archdiocese's conduct of its religious affairs nor upon the Commonwealth's independence from religious considerations in the exercise of its sovereign authority.

Reduced to its essential nature, Scituate's argument becomes identical to the claim which this Court has consistently rejected: that the Establishment Clause prohibits state sponsorship of any program which in some manner provides aid to an organization with a religious affiliation. *Hunt* v. *McNair*, 413 U.S. 734, 742 (1973) (secular aid to religious college); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (exemption of religious organizations from property taxation); *Bradfield* v. *Roberts*, *supra*. The Constitution does not require religious institutions to be quarantined from public benefits which are neutrally available to all. *Roemer*, *supra*, at 746. In this case, the public benefit which Scituate seeks to curtail is the opportunity which Massachusetts law presents for the development of low and moderate income housing. It happens that such sponsorship furthers the social responsibilities of the Roman Catholic Church, but this fortuity does not trigger the bar which the Establishment Clause erects against excessive entanglement of the church in the affairs of government.

Conclusion.

For the reasons set forth above, this Court should deny the petition for certiorari.

Respectfully submitted,

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Appendix.

MASSACHUSETTS GENERAL LAWS ANNOTATED
CHAPTER 40B, §§ 20-23
(WEST SUPP. 1977).

LOW AND MODERATE INCOME HOUSING.

Added by St. 1969, c. 774, § 1.

§ 20. [Definitions.]

The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.

§ 21. [Low or moderate income housing; applications for approval of proposed construction; hearing; appeal.]

Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section twelve of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The provisions of section eleven of chapter forty A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to

have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.

§ 22. [**Appeal to housing appeals committee; procedure; judicial review.**]

Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the department of community affairs for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A.

§ 23. [**Hearing by housing appeals committee; issues; powers of disposition; orders; enforcement.**]

The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.